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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DONALD C. MARRO et al., **Plaintiffs and Appellants,** **v.** **FRANCHISE TAX BOARD,** **Defendant and Respondent.**	**A104139** **(San Francisco County Super. Ct. No. CGC 02-414788)**

Plaintiffs Donald C. Marro and Lillian S. Clancy appeal from a judgment of dismissal with prejudice entered in favor of defendant Franchise Tax Board (FTB), after the trial court sustained demurrers to plaintiffs' first amended complaint without leave to amend. The trial court concluded that the causes of action seeking a refund of taxes and declaratory relief were deficient as a matter of law. We agree and affirm the judgment of dismissal.

BACKGROUND

Plaintiffs, husband and wife, brought this action against the FTB seeking a refund of certain disputed taxes paid to the FTB for tax years 1993 and 1994. Plaintiffs also sought declaratory relief to determine whether interest on the disputed taxes could be the subject of a state tax lien while their suit for refund was pending.

The first amended complaint alleged that in October 1996 the Internal Revenue Service (IRS) made a finding that plaintiffs owed taxes and interest for tax years 1992,

1993 and 1994. Although not conceding that they had done anything improper, plaintiffs consented to the IRS finding on October 16, 1996. Plaintiffs did not notify the FTB of the changes to their federal tax returns. According to plaintiffs, they relied on the IRS to notify the FTB under the Internal Revenue Code (26 U.S.C. § 6103(d)).

Sometime in 1998, after the two-year period for appeal of the IRS finding had expired, plaintiffs discarded the paperwork related to the IRS finding and the changes in these tax returns. On June 25, 1999, the FTB mailed plaintiffs two notices of proposed assessment (NPA's) for tax years 1993 and 1994 that were allegedly predicated on the IRS finding and the changes to those returns. On July 3, 1999, plaintiffs delivered to the FTB a notice of protest for these NPA's. Plaintiffs asserted that collection of the taxes assessed in the NPA's was barred because the limitation period for the pertinent tax years had expired. The FTB disagreed, contending that the limitations period for the pertinent tax returns had been suspended by Revenue and Taxation Code[1] section 19060 (Stats. 1993, ch. 31, § 26, eff. June 16, 1993, operative Jan. 1, 1994, p. 217), and, hence, that the NPA's could have been issued at any time.

Plaintiffs paid the alleged taxes due the FTB and applied for a refund, which was denied. The State Board of Equalization also denied plaintiffs' administrative appeal after finding that the notices of proposed assessment were timely issued and that plaintiffs had failed to show the assessments were erroneous or that equitable estoppel should apply.

Plaintiffs then filed the current suit for a refund in superior court. The FTB demurred to the first amended complaint asserting that, under section 19060, the FTB had unlimited time to issue the NPA's because plaintiffs had failed to notify FTB of the changes to their 1993 and 1994 federal tax returns. The FTB noted that section 18622

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[1] All undesignated section references are to the Revenue and Taxation Code.

We are aware that the sections of the Revenue and Taxation Code we examine in this case underwent legislative revision in 1999 (Stats. 1999, ch. 987, § 4 et seq., eff. Oct. 10, 1999), after the events which gave rise to the dispute presented in this case. We examine

(Stats. 1993, ch. 877, § 23.1, eff. Oct. 6, 1993, operative Jan. 1, 1994, p. 4712) requires California taxpayers to report to the FTB any change or correction made to their federal tax returns within six months of the final determination of the change or correction. Section 19060, subdivision (a) stated that "If a taxpayer fails to report a change or correction by the Commissioner of Internal Revenue . . . , a notice of proposed deficiency assessment resulting from the adjustment may be mailed to the taxpayer at any time after the change, correction, or amended return is reported to or filed with the federal government."

The trial court agreed with the FTB's position and sustained the demurrers without leave to amend. This appeal followed.

DISCUSSION

I. *Standard of Review*

"A demurrer tests the legal sufficiency of the complaint . . . ." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) On appeal from a dismissal following an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We assume the truth of all facts properly pleaded in the complaint, as well as those that may be implied or inferred from the express allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) "We do not, however, assume the truth of contentions, deductions or conclusions of fact or law. [Citation.]" (*Moore*, at p. 125.) When analyzing a demurrer we look "*only* to the face of the pleadings and to matters judicially noticeable and not to the evidence or other extrinsic matter. [Citations.]" (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 239, fn. 2; see also 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 900, p. 358.)

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the issues before us based on the wording of those sections as they existed in October 1996.

We are "not bound by the trial court's construction of the complaint." (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958.) Rather, we independently evaluate the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) We must determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory, regardless of the title under which the factual basis for relief is stated. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38; *Blank*, at p. 318; *Lazar*, at p. 1501.)

II. *The NPA's Were Timely*

Plaintiffs consented to the IRS adjustments to their tax returns for 1993 and 1994,[2] and do not contest that they would have owed additional tax to the FTB if the NPA's had been issued within two years after the IRS issued its adjustments to those tax years. Instead, they contest the FTB assessments based on their assertion that the NPA's were untimely.

The Revenue and Taxation Code requires notification from a taxpayer in instances where the taxpayer has undergone a federal audit that has resulted in adjustments to the taxpayer's federal tax liabilities. Section 18622, subdivision (a) provided: "If the amount of gross income or deductions for any year of any taxpayer as returned to the United States Treasury Department is changed or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority. . . . that taxpayer shall report the change or correction. . . . within six months after the final federal determination of the change or correction . . . . or as required by the Franchise Tax Board, and shall concede the accuracy of the determination or state wherein it is erroneous . . . ." (Stats. 1993, ch. 877, § 23.1, *supra*, p. 4712.)

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[2] FTB's request for this court to take judicial notice of plaintiffs' signed consent to the IRS adjustments to their 1993 and 1994 tax returns is granted. (Evid. Code, §§ 452, subd. (c), 459.)

Here, it is undisputed that plaintiffs did not report the IRS adjustments to their 1993 and 1994 federal tax returns within the six-month period prescribed by section 18622. Instead, plaintiffs assert that they "relied on the IRS to notify the FTB" of the changes to their federal tax returns. Section 19060, subdivision (a) provided that "If a taxpayer fails to report a change or correction by the Commissioner of Internal Revenue or other officer of the United States . . . or fails to file an amended return as required by Section 18622, a notice of proposed deficiency assessment resulting from the adjustment may be mailed to the taxpayer *at any time* . . . ." (Stats. 1993, ch. 31, § 26, *supra*, p. 217, italics added.) Thus, the plain language of section 19060 provided the FTB an unlimited time to issue the NPA's covering these IRS adjustments.

Plaintiffs argue that section 19060 is inapplicable, claiming that the section does not operate to revive an action that had already become time-barred under two other statutes of limitation within the Revenue and Taxation Code—sections 19057 (Stats. 1993, ch. 877, § 27, eff. Oct. 6, 1993, operative Jan. 1, 1994, p. 4716) and 19059 (Stats. 1993, ch. 878, § 6, p. 4749). Neither of these sections supports plaintiffs' position.

Section 19057, subdivision (a) provided that "except as otherwise expressly provided in this part," a deficiency assessment "shall be mailed to the taxpayer within four years after the return was filed." (Stats. 1993, ch. 877, § 27, *supra*, p. 4716.) Since sections 19057 and 19060 are contained within the same part of the Revenue and Taxation Code governing deficiency assessments (Div. 2, pt. 10.2, ch. 4, art. 3, §§ 19031-19067), the plain language of section 19057 subordinated its limitations period to section 19060.

Section 19059 provided that if a taxpayer reported a change or correction in the taxpayer's federal tax return by the IRS to the FTB within six months of the change or correction, then "a notice of proposed deficiency assessment resulting from those adjustments may be mailed to the taxpayer within two years from the date when the

notice is filed with the [FTB]. . . ."[3] (Stats. 1993, ch. 878, § 6, p. 4749.) Hence, under section 19059, plaintiffs would only have been entitled to avail themselves of this two-year statute of limitations, if they had reported the October 1996 changes to their federal tax returns to the FTB within six months of the changes. Since plaintiffs did not do so, section 19059 is inapplicable to their situation.

Plaintiffs argue that they were entitled to rely upon the IRS to notify the FTB of the changes to their federal tax returns pursuant to the Internal Revenue Code (26 U.S.C. § 6103(d)).[4] According to plaintiffs, this section statutorily obligated the IRS to stand in

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[3] Effective October 10, 1999, section 19059, subdivision (a) was revised to provide that if notification of an IRS adjustment to a taxpayer's federal tax return is received by the FTB *from the IRS within six months* of the final federal determination, the FTB has two years from the date of the notice to issue its proposed deficiency assessment. (Stats. 1999, ch. 987, § 71, *supra.*) Also effective October 10, 1999, section 19060, subdivision (b) was revised to provide that if notice of an IRS adjustment is received *from the IRS after six months* from the date of the final federal determination, the FTB has four years from the date of the notice to issue its proposed deficiency assessment. (Stats. 1999, ch. 987, § 72, *supra.*) Neither of these revisions applies to the present case because plaintiffs' duty to report the IRS assessments at issue here arose in October 1996 when the IRS assessments were made. Furthermore, even if the 1999 revisions of sections 19059 and 19060 were applicable to this case, the FTB's June 1999 NPA's would have been timely. Since the December 23, 1998 notification from the IRS to the FTB was received more than six months *after* the October 1996 date of the federal finding at issue in this case, under the 1999 revision to section 19060, subdivision (b), the FTB would have had four years to issue the NPA's from the December 23, 1998 IRS notice to the FTB.

[4] The pertinent portions of section 6103(d) of title 26 of the United States Code, which remain unchanged since October 1996, provide:

"**(d) Disclosure to State tax officials and State and local law enforcement agencies.—**

"**(1) In general.**—Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such

their place to notify the FTB of the federal tax changes. This section of the Internal Revenue Code authorizes disclosure by the IRS of federal taxpayer information to state tax officials, such as the FTB, that would otherwise remain confidential under federal law. (See 26 U.S.C. § 6103(a) & (d); and see *People v. McLemore* (1985) 166 Cal.App.3d 718, 719, 720.) However, section 6103(d) of title 26 of the United States Code creates no obligation on the part of the IRS to "stand in the shoes" of federal taxpayers in their dealings with state tax officials. Moreover, California's sovereign taxing power is concurrent with that of the federal government. (See *Gibbons v. Ogden* (1824) 22 U.S. 1, 197; *McCulloch v. Maryland* (1819) 17 U.S. 316, 425.) Regardless of any alleged obligation on the part of the IRS to notify the FTB of federal tax changes, California is entitled to require its taxpayers to self-report such changes and to modify the applicable statute of limitations to promote compliance.

As described above, section 18622 obligated plaintiffs, as California taxpayers, to self-report to the FTB any change made to their federal tax returns within six months of

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agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an employee or legal representative of such agency, body, or commission nor a person described in subsection (n). However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.

"**(2) Disclosure to State audit agencies.—**

"**(A) In general.**—Any returns or return information obtained under paragraph (1) by any State agency, body, or commission may be open to inspection by, or disclosure to, officers and employees of the State audit agency for the purpose of, and only to the extent necessary in, making an audit of the State agency, body, or commission referred to in paragraph (1).

"**(B) State audit agency.**—For purposes of subparagraph (A), the term 'State audit agency' means any State agency, body, or commission which is charged under the laws of the State with the responsibility of auditing State revenues and programs." (Boldface type in original.)

the final determination of such changes. Plaintiffs' failure to do so, in turn, triggered the application of section 19060, thereby giving the FTB unlimited time to issue the NPA's to plaintiffs. The trial court was correct in concluding that the FTB issued the NPA's on a timely basis.

III. *Due Process*

Plaintiffs contend that "FTB mishandling" and "untimely processing" of the changes to their federal tax returns violated their due process rights to file a timely appeal of the October 1996 IRS finding against them. Plaintiffs claim that they "could and would have appealed" the IRS finding before the two-year period had expired if the FTB had issued its NPA's on a timely basis. Plaintiffs assert they were prejudiced by the running of the federal limitations period for filing an appeal of the IRS finding and by their subsequent disposal of tax records pertinent to the IRS finding. Because plaintiffs have failed to adequately support this contention on appeal with reasoned argument and citation of authority, we deem the argument waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Plaintiffs' waiver notwithstanding, the contention also fails on its merits.

The FTB issued the NPA's in a timely fashion under section 19060, and plaintiffs have made no substantive showing of any other "mishandling" or error by the FTB. On October 11, 1996, plaintiffs' consented to the IRS finding and expressly relinquished rights to appeal the finding with the IRS or to contest the finding in the United States Tax Court. If plaintiffs hoped to avail themselves of the statutes of limitations provided to taxpayers against future assessments by the FTB under the State's Revenue and Taxation Code, plaintiffs were obliged to comply with the state law requiring that they report the IRS finding to the FTB themselves under section 18622. Thus, plaintiffs' own lack of diligence is the reason why they receive no protection from the other statutes of limitations within the Revenue and Taxation Code.

IV. *Estoppel*

Plaintiffs' claims for estoppel are equally without merit. Plaintiffs cannot claim ignorance of the legal effect of their failure to comply with section 19060. In addition,

they have conceded in the complaint that they failed to notify the FTB of the IRS finding. Hence, plaintiffs are unable to allege any reasonable basis to rely upon the statutes of limitations contained within the Revenue and Taxation Code. (See *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 938-939; *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 757; and see generally *People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 552.)

V. *Declaratory Relief*

Plaintiffs contend that the trial court erred in sustaining the demurrer to their second cause of action seeking a declaratory judgment that the FTB had no lawful authority to record a tax lien against plaintiffs for the uncollected interest allegedly accruing on the disputed state taxes before plaintiffs paid them, and on the interest on the unpaid interest which has accrued while plaintiffs have litigated the merits of their tax refund claim. Plaintiffs assert that section 19221 does not authorize a lien for interest on disputed taxes, and that no lien for disputed taxes may be initiated or maintained under that section while a suit for refund is pending. The FTB disagrees, contending that section 19221, subdivision (a) expressly authorizes the type of tax lien complained of by plaintiffs. We conclude that the FTB's analysis is correct.

In an appeal from a dismissal on demurrer of a declaratory relief cause of action, appellate courts normally apply an abuse of discretion standard. However, where, as in this case, the facts are not in dispute, the appellate court can independently determine whether declaratory relief is a proper remedy as a pure question of law. (*C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 383; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶¶ 8:136.4-8:136.5, pp. 8-78 to 8-79.)

Here, the pertinent portion of section 19221, subdivision (a), which remains unchanged since 1996, provides: "If any taxpayer or person fails to pay any liability imposed under Part 10 . . . or Part 11 . . . at any time that it becomes due and payable, the amount thereof, (*including any interest*, additional amount, addition to tax, or penalty, together with any costs that may accrue in addition thereto) shall thereupon be a perfected

and enforceable state tax lien." (Italics added.) This wording is unambiguous in allowing the lien to include interest on taxes owed, in addition to the amount of the tax itself. Where, as here, the language of a statute is unambiguous, there is no need to engage in further construction of the statute and courts should refrain from doing so. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 329-330; *Chen v. Franchise Tax Board* (1998) 75 Cal.App.4th 1110, 1121.) Further, plaintiffs' interpretation of the statute is unpersuasive since it would render the Legislature's inclusion of the wording "any interest" within the section mere surplusage. (*Agnew*, at p. 330.)

Moreover, plaintiffs have presented no citation of authority to indicate the FTB's lien power under section 19221 excludes interest due on the unpaid taxes or the interest accruing while a taxpayer's refund action remains pending. Existing case authorities establish that accrued interest on a disputed tax payment is different than the "tax" debt itself, and that a taxpayer is not obligated *to pay* the interest due or accruing on a disputed tax payment as a precondition to pursuing a refund action against the FTB. (E.g., *Agnew v. State Bd. of Equalization, supra,* 21 Cal.4th at pp. 314-315, 333-334 [payment of accrued interest not a prerequisite to bringing a refund action]; *Chen v. Franchise Tax Board, supra,* 75 Cal.App.4th at p. 1123-1124 [same].) However, none of the authorities cited by plaintiffs have restricted in any way the FTB's ability *to secure* future payment of interest due and accruing on a disputed tax payment through use of the FTB's statutory lien powers. Because plaintiffs have offered no pertinent legal authority to support their challenge on this point, we deem it to be without foundation and do not discuss it further. (E.g., *Nast v. State Bd. of Equalization* (1996) 46 Cal.App.4th 343, 348.)

For the first time in their reply brief, plaintiffs argue that "no statute authorizes interest on interest." The reply brief provides no citation of authority or reasoned argument to support the contention, and therefore we deem it waived. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.) Indeed, since plaintiffs first raise the argument in their reply brief, we deem it "doubly waived." (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92, fn. 2.)

VI. *Trial Court's Statement of Reasons*

Plaintiffs contend that the trial court abused its discretion by failing to set forth its reasons for sustaining the demurrer without leave to amend. Again, plaintiffs present no citation of authority or reasoned argument to support the contention, and therefore we deem it waived. (*Ellenberger v. Espinosa, supra,* 30 Cal.App.4th at p. 948.)

VII. *Conclusion*

None of plaintiffs' contentions have merit. We further conclude that plaintiffs have failed to show that they could amend any of their claims to change the legal effect of their first amended complaint. Consequently, the trial court was correct to sustain the FTB's demurrers without leave to amend. (See generally *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

DISPOSITION

The judgment of dismissal in favor of the FTB is affirmed. The FTB shall recover its costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.